JOBNAME: No Job Name PAGE: 1 SESS: 1 OUTPUT: Wed Nov 26 11:54:08 2014

Owi Cheng Ian v Suruhanjaya Pasukan Polis Diraja Malaysia & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01–672 OF 2010
SYED AHMAD HELMY, ABDUL WAHAB PATAIL AND MOHAMAD ARIFF JJCA
15 APRIL 2014

Administrative Law — Exercise of administrative powers — Dismissal from service — Chief Inspector dismissed from police force — Application for judicial review — Assertion that authority did not adhere to procedural requirements — Whether correct quorum sat as disciplinary authority — Whether Police Force Commission legally appointed — Procedural unfairness — Opportunity to be heard — Whether given — Whether charge defective — Federal Constitution arts 135(2), 140(1) & (3)

Having been dismissed from the police force, the appellant, a chief inspector applied for judicial review in the High Court, arguing that the authority did not adhere to the procedural requirements and that his dismissal ought to be set aside. The application was dismissed and in this present appeal, the appellant argued on the authority of the quorum that sat as the disciplinary authority; the show cause letter and the 'surat pemberitahuan hukuman tatatertib ('the two letters') were signed by the *Setiausaha* Suruhanjaya Pasukan Polis; the date of commencement of the decision was not stated in the 'surat pemberitahuan hukuman tatatertib'; he was denied an opportunity to be heard in his defence; and that the charges against him were defective.

Held, allowing the appeal:

(1) The proviso to art 140(1) of the Federal Constitution ('the Constitution') refers to Parliament taking steps of providing for the exercise of disciplinary control. However, the Instrument of Delegation of Certain Functions PU(B) 441/2000 is not a legislation by Parliament under the proviso but an act of delegation by the Police Force Commission under the powers authorised vide art 140(3) of the Constitution (see paras 12–13).

(2) The two letters showed that they were the letterheads of the *Setiausaha* Suruhanjaya Pasukan Polis, and in the absence of evidence to the contrary, it was sufficient to prove, upon a balance of probabilities, that they were issued by the *Setiausaha* Suruhanjaya Pasukan Polis (see para 17).

JOBNAME: No Job Name PAGE: 2 SESS: 1 OUTPUT: Wed Nov 26 11:54:08 2014

(3) The decision of the disciplinary authority ought to have precisely stated as to when it intended the punishment of dismissal to operate from. It was important as it would impact the payments, if any, which the appellant was entitled to receive. Such date could not be assigned by other than the disciplinary authority. Without specifying the date, the dismissal was incomplete and therefore defective (see para 21).

(4) Article 135(2) of the Constitution requires that reasonable opportunity be given to be heard. What is reasonable must be determined by the nature of the matter at issue and to be heard. The right to be heard is a right fundamental to natural justice. It gives an opportunity for a party to provide explanation against an accusation. The process to ensure procedural fairness as required by art 135(2) of the Constitution had not been adhered to. The appellant had been denied an opportunity to be heard in his defence (see paras 26–27).

(5) The charge was not defective, although the appellant may not know of all the evidence against him. The purpose of a charge is similar to the purpose of a pleading. It is to make clear to the other party what was the case being made out against him. Similar to a pleading, it was not necessary to plead evidence in a charge (see paras 31–32).

[Bahasa Malaysia summary

Setelah dibuang kerja daripada angkatan polis, perayu, ketua inspektor memohon untuk semakan kehakiman di Mahkamah Tinggi, mendakwa bahawa pihak berkuasa tidak mematuhi kepada kehendak prosedur dan bahawa pembuangan kerjanya patut diketepikan. Permohonan ditolak dan dalam rayuan ini, perayu berhujah mengenai kuasa korum yang menjadi pihak berkuasa tatatertib; surat tunjuk sebab dan 'surat pemberitahuan hukuman tatatertib' ('kedua-dua surat tersebut') ditandatangani oleh Setiausaha Suruhanjaya Pasukan Polis; tarikh permulaan keputusan tidak dinyatakan di dalam 'surat pemberitahuan hukuman tatatertib'; dia dinafikan peluang untuk didengar dalam pembelaannya; dan bahawa hukuman-hukuman terhadapnya adalah cacat.

Diputuskan, membenarkan rayuan:

(1) Peruntukan kepada perkara 140(1) Perlembagaan Persekutuan ('Perlembagaan') merujuk kepada Parlimen mengambil langkah dalam memperuntukkan untuk menjalankan kawalan tatatertib. Walau bagaimanapun, *Instrument of Delegation of Certain Functions* PU(B) 441/2000 bukan perundangan oleh Parlimen di bawah peruntukan tetapi tindakan perwakilan oleh Suruhanjaya Pasukan Polis di bawah kuasa yang dibenarkan melalui perkara 140(3) Perlembagaan (lihat perenggan 12–13).

(2) Kedua-dua surat menunjukkan bahawa ia adalah surat kepala daripada

JOBNAME: No Job Name PAGE: 3 SESS: 1 OUTPUT: Wed Nov 26 11:54:08 2014

Setiausaha Suruhanjaya Pasukan Polis, dan dalam ketiadaan keterangan bertentangan, adalah mencukupi untuk membuktikan, atas imbangan kebarangkalian, bahawa ia dikeluarkan oleh Setiausaha Suruhanjaya Pasukan Polis (lihat perenggan 17).

(3) Keputusan pihak berkuasa tatatertib patut secara tepat menyatakan bila ia berniat untuk hukuman pembuangan kerja mula beroperasi. Adalah penting kerana ia akan menjejaskan bayaran-bayaran, jika ada, yang mana perayu berhak menerimanya. Tarikh sedemikian tidak boleh diberikan oleh orang lain hanya oleh pihak berkuasa tatatertib. Tanpa menyatakan tarikh tersebut, pembuangan kerja tidak lengkap dan oleh itu cacat (lihat perenggan 21).

(4) Perkara 135(2) Perlembagaan memerlukan bahawa peluang munasabah diberikan untuk didengar. Apa yang munasabah mesti ditentukan oleh sifat perkara isu dan untuk didengar. Hak untuk didengar adalah asas hak kepada keadilan. Ia memberi peluang kepada pihak untuk memperuntukkan penjelasan terhadap tuduhan. Proses untuk memastikan keadilan prosedur seperti yang dikehendaki oleh perkara 135(2) Perlembagaan tidak dipatuhi. Perayu telah dinafikan dengan peluang untuk didengar dalam pembelaannya (lihat perenggan 26–27).

(5) Tuduhan bukan cacat, walaupun perayu mungkin tidak mengetahui kesemua keterangan terhadapnya. Tujuan tuduhan adalah sama kepada tujuan pliding. Ia adalah untuk memberi penjelasan kepada pihak lain apakah kes yang dibuat terhadapnya. Sama dengan pliding, adalah tidak perlu untuk memplid keterangan dalam tuduhan (lihat perenggan 31–32).]

Notes

For cases on dismissal from service, see 1(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 83–98.

Cases referred to

Chief Constable of the North Wales Police v Evans [1982] 3 All ER 141, HL (refd)

Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281, CA (distd)

Yusof bin Sudin v Suruhanjaya Perkhidmatan Polis & Anor [2011] 5 MLJ 465, FC (refd)

Legislation referred to

Federal Constitution arts 135(2), 135(2)(b), 140(1), (3), (6)(b)

Rules of the High Court 1980 O 53, O 53(1)

Appeal from: Judicial Review Application No (RKK2)–25–187 of 2009 (High Court, Kuala Lumpur)

JOBNAME: No Job Name PAGE: 4 SESS: 1 OUTPUT: Wed Nov 26 11:54:08 2014

G Subramaniam Nair (Ebrina bt Zubir with him) (Maniam Nair & Co) for the appellant.
Shamsul Bolhassan (Aida Adhha Abu Bakar with him) (Senior Federal Counsel, Attorney General's Chambers) for the respondents.

Abdul Wahab Patail JCA:

[1] The appellant Owi Cheng Ian appealed to this court against the dismissal on 8 October 2010 by the High Court of his application dated 2 June 2009 under O 53 of the Rules of the High Court 1980 for judicial review. He obtained leave under O 53 on 13 July 2009, and had sought the following reliefs:

(a) ... membatalkan keputusan yang telah diberi oleh Suruhanjaya Pasukan Polis DiRaja Malaysia (Responden Pertama) bagi pihak Responden Kedua dan Ketiga pada 11-03-2009 untuk membuang kerja pemohon dari Pasukan Polis Di Raja Malaysia dan bahawa Pemohon masih merupakan pekerja Responden Ketiga, Kerajaan Malaysia, dan digajikan sebagai Ketua Inspektor;

(b) Suatu siasatan untuk menentukan tunggakan gaji, emolumen, elaun-elaun dan faedah-faedah lain yang Pemohon sepatutnya menerima dari tarikh Pemohon ditahan kerja (16-05-2006) sehingga 11-03-2009 dan seterusnya dari 12-03-2009 sehingga penyelesaian penuh;

(c) Faedah pada kadar 8% setahun dari 16-05-2006 (tarikh ditahan kerja) sehingga 11-03-2009 dan seterusnya dari 12-03-2009 sehingga penyelesaian penuh;

(d) Untuk semua Perintah-Perintah yang diperlukan dan berbangkit diberi; dan

(e) Bahawa kos usul ini dan kos yang disebabkan oleh usul ini hendaklah menjadi kos dalam kausa.

[2] Having heard the parties, we allowed the appeal, and:

(a) set aside the order of the High Court;

(b) set aside the decision of the Police Force Commission;

(c) ordered that the appellant be reinstated without loss;

(d) fixed costs in the sum of RM10,000; and

(e) ordered that the deposit be refunded.

[3] In pursuing the appeal, the appellant relied upon the principles enunciated in:

(a) *Chief Constable of the North Wales Police v Evans* [1982] 3 All ER 141

JOBNAME: No Job Name PAGE: 5 SESS: 1 OUTPUT: Wed Nov 26 11:54:08 2014

(House of Lords) that judicial review is concerned, not with the decision, but with the decision making process; and

(b) *Yusof bin Sudin v Suruhanjaya Perkhidmatan Polis & Anor* [2011] 5 MLJ 465 (FC) that no man shall be condemned unheard, and that failure to observe procedural fairness is tantamount to a breach or aiding a breach of a fundamental right, in this case his right to his employment.

[4] Seven issues were submitted upon before us.

THE FIRST ISSUE

[5] The first issue concerns authority of the quorum that sat as the disciplinary authority.

[6] In his affidavit in reply dated 22 February 2010, Dato' Azahar bin Raja Abdul Manap, at para 7, stated:

> 7. Selaras dengan Suratcara Perwakilan Fungsi-Fungsi, Kuasa-Kuasa, Tugas-Tugas Dan Tanggungjawab-Tanggungjawab Tertentu [P.U.(B) 441/2000], pengerusi Lembaga-Tatatertib yang dilantik pada masa yang material, mendapati prima facie wujudnya pelanggaran tatakelakuan yang boleh menyebabkan tindakan tatatertib diambil terhadap pemohon.

[7] At para 11g of the same affidavit, he stated:

> g. Perlantikan pengerusi dan anggota Responden Pertama telah dibuat selaras dengan perkara 140(3) Perlembagaan Persekutuan.

[8] The appellant responded in his affidavit of 12 May 2010 that:

> 13. Perenggan 11(f) dan 11(g) Affidavit Jawapan tersebut adalah dinafikan dan Responden-Responden diletakkan beban bukti yang kukuh untuk membuktikannya.

[9] Article 140(3) of the Federal Constitution provides:

> (3) The Police Force Commission shall consist of the following members, that is to say:
>
> (a) the Minister for the time being charged with responsibility for the police, who shall be Chairman;
>
> (b) the officer of police in general command of the police force;
>
> (c) the person performing the duties of the office of Secretary General to the Ministry under the Minister for the time being charged with responsibility for the police;

JOBNAME: No Job Name PAGE: 6 SESS: 1 OUTPUT: Wed Nov 26 11:54:08 2014

(d) a member of the Public Services Commission appointed by the Yang di-Pertuan Agong;

(e) not less than two nor more than six other members, appointed by the Yang di-Pertuan Agong.

[10] Article 140(6)(b) of the Federal Constitution authorises the delegation under the *Instrument of Delegation of Certain Functions, Instrument of Delegation of Certain Functions PU(B) 441/2000*.

[11] It was submitted, relying on the proviso to art 140(1) that where a delegation had been made, the Police Force Commission ceased to have authority.

[12] The proviso to art 140(1) is as follows:

> Provided that Parliament may by law provide for the exercise of such disciplinary control over all or any of the members of the police force in such manner and by such authority as may be provided in that law and in that event, if the authority is other than the Commission, the disciplinary control exercisable by such authority shall not be exercised by the Commission; and no provision of such law shall be invalid on the ground of inconsistency with any provision of this Part.

[13] It refers to Parliament taking the step of providing by law for the exercise of disciplinary control. The *Instrument of Delegation of Certain Functions, Instrument of Delegation of Certain Functions PU(B) 441/2000*, however, is not legislation by Parliament under the proviso, but an act of delegation by the Police Force Commission under powers authorised under art 140(3).

[14] We find no merit in the submission on this first issue.

THE SECOND ISSUE

[15] The second issue is that Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) (Pindaan) 2002 PU(A) 246/2002. Regulation 53 thereof reads as follows:

> 53. Apa-apa surat-menyurat antara Pihak Berkuasa Tatatertib yang berkenaan dengan pegawai yang tertakluk kepada tindakan tatatertib hendaklah ditandatangani oleh Pengerusi Pihak Berkuasa Tatatertib yang berkenaan atau oleh mana-mana anggota Pihak Berkuasa Tatatertib bagi pihak Pengerusi.

[16] It was submitted that the show cause letter KKDN(R)/211/1199/1-178 dated 18 September 2007 and the *pemberitahuan hukuman tatatertib* KKDN(R) 211/1199/1-178 dated 11 March 2009 were signed by Tan Sri Abdul Aziz bin Mohd Yusof as *Setiausaha* Suruhanjaya Pasukan Polis and Dato'

JOBNAME: No Job Name PAGE: 7 SESS: 1 OUTPUT: Wed Nov 26 11:54:08 2014

Raja Azahar bin Raja Abdul Manap respectively, the latter without stating his capacity.

[17] Examination of the two letters show clearly these were the letterheads of the *Setiausaha* Suruhanjaya Pasukan Polis, and in the absence of evidence to the contrary, is sufficient to prove upon a balance of probabilities that they were issued by the *Setiausaha* Suruhanjaya Pasukan Polis.

[18] We find no merit in the submission on this second issue.

THE THIRD ISSUE

[19] The third issue is that the date of commencement of the decision was not stated on the *pemberitahuan hukuman tatatertib*.

[20] The *pemberitahuan hukuman tatatertib* read as follows:

> Dengan hormatnya saya memaklumkan bahawa Suruhanjaya Pasukan Polis di dalam mesyuaratnya yang ke-74 pada 11.03.2009 selepas menimbang surat representasi tuan bertarikh 20.1.2008 dengan teliti dan saksama telah membuat keputusan seperti berikut:
>
> (a) Tuan didapati bersalah dan dikenakan hukuman Buang Kerja mengikut Peraturan 38 (o) Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 (pindaan) 2002 bagi pertuduhan pertama.
>
> (b) Tuan didapati bersalah dan dikenakan hukuman Amaran mengikut Peraturan 38 (a), Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 (pindaan) 2002 bagi pertuduhan kedua.
>
> (c) Tuan didapati tidak bersalah dan berjaya membebaskan diri daripada pertuduhan ketiga.
>
> (d) Tuan didapati bersalah dan dikenakan hukuman Amaran mengikut Peraturan 38 (a), Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 (pindaan) 2002 bagi pertuduhan keempat.

[21] The appellant was served with a copy of the letter nearly two months later on 6 May 2009. Although this third issue was specifically raised by the appellant at para 10(f) of his affidavit dated 30 May 2009, it was not addressed in the affidavit in reply. The High Court held that the date of termination operates from the date of the decision. With respect, the High Court erred in stopping at that determination. The point is that the determination was made upon litigation. No further litigation should become necessary to determine the details of an order of a disciplinary authority. The point raised is that the *pemberitahuan hukuman tatatertib* ought to have stated it clearly, reflecting the decision of the disciplinary authority precisely as to when it intended the punishment of dismissal to operate from. It is also important as it impacts upon

JOBNAME: No Job Name PAGE: 8 SESS: 1 OUTPUT: Wed Nov 26 11:54:08 2014

the payments, if any, the appellant was entitled to receive or even to refund. Such date cannot be assigned by other than the disciplinary authority. Without the date of dismissal being specified, the dismissal was incomplete and, therefore, defective.

[22] We accept there is merit in the third issue.

THE FOURTH ISSUE

[23] The fourth issue is failure to accord the right under art 135(2) of the Federal Constitution to be heard, and failure to give notice of the hearing.

[24] This issue was pleaded at para 10(9), 10(h) and 10(n) of the appellant's affidavit, responded to at paras 10, 11(a), 11(d), 11(8) and 11(f) of the respondent's afidavit in reply and at paras 8–9 and 12 the appellant's reply.

[25] Article 135(2) provides:

> (2) No member of such a service as aforesaid shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard:
>
> Provided that this clause shall not apply to the following cases:
>
> (a) where a member of such a service is dismissed or reduced in rank on the ground of conduct in respect of which a criminal charge has been proved against him; or
>
> (b) where the authority empowered to dismiss or reduce in rank a member of such a service is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to carry out the requirements of this Clause; or
>
> (c) where the Yang di-Pertuan Agong, or, in the case of a member of the public service of a State, the Ruler or Yang di-Pertua Negeri of that State, is satisfied that in the interests of the security of the Federation or any part thereof it is not expedient to carry out the requirements of this Clause; or
>
> (d) where there has been made against a member of such a service any order of detention, supervision, restricted residence, banishment or deportation, or where there has been imposed on such a member any form of restriction or supervision by bond or otherwise, under any law relating to the security of the Federation or any part thereof, prevention of crime, preventive detention, restricted residence, banishment, immigration, or protection of women and girls:
>
> Provided further that for the purpose of this Article, where the service of a member of such a service is terminated in the public interest under any law for the time being in force or under any regulation made by the Yang di-Pertuan Agong under Clause (2) of Article 132, such termination of service shall not constitute dismissal whether or not the decision to terminate the service is connected with the misconduct of or

JOBNAME: No Job Name PAGE: 9 SESS: 1 OUTPUT: Wed Nov 26 11:54:08 2014

A unsatisfactory performance of duty by such member in relation to his office or the consequences of the termination involved an element of punishment; and this proviso shall be deemed to have been an integral part of this Article as from Merdeka Day.

B **[26]** We note that art 135(2) requires that reasonable opportunity be given of being heard. What is reasonable must be determined by the nature of the matter at issue and to be heard. Proviso (b) provides an exception only where it is not practicable to carry out the requirements of art 135(2), and in such case only if it is satisfied of the reason and that it is recorded in writing. We found C no such record of any reason why it is not reasonably practicable to carry out the requirements of art 135(2).

[27] The right to be heard is a right fundamental to natural justice, giving a D party an opportunity to give an explanation against an accusation or evidence to be taken into consideration against him. Some of these may by their very nature can be adequately dealt with by a written representation. In the absence of clear explanation why for example, the CCTV recording need not be viewed by the appellant together with the disciplinary authority to enable him to give E an explanation, it is difficult to reject the assertion that he had been denied an opportunity to be heard in his defence.

[28] We hold there is merit in this fourth issue.

F THE FIFTH ISSUE

[29] The fifth issue pertains to the appellant's denials of the accusations of misconduct made against him. If a person had not been afforded an opportunity to address the evidence relied upon to form the basis of facts for G the accusations against him, it is difficult to hold safely that no injustice had occurred.

[30] We hold there is merit in this fifth issue.

H THE SIXTH ISSUE

[31] The sixth issue raised is as to charges being defective for various reasons.

I **[32]** The purpose of a charge is similar to the purpose of a pleading. It is to make clear to the other party what is the case being made out against him. It is not necessary in a pleading to plead the evidence. Likewise in a charge. No further and better particulars appear to have been previously sought and

JOBNAME: No Job Name PAGE: 10 SESS: 1 OUTPUT: Wed Nov 26 11:54:08 2014

denied. Though the appellant may not know of all of the evidence against him, that is another issue, but is not a defect of the charge as asserted in this sixth issue.

[33] We find no merit in this sixth issue.

THE SEVENTH ISSUE

[34] The seventh issue is as to mala fide. It was submitted that the appellant had pleaded mala fide at para 10(o)(i)–10(o)(iv), and that it was established, relying upon *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281 (CA), when the respondents failed to reply or to deny it specifically. Any such inference is not merely a matter of discretion, but is an exercise of judgement, and cannot be made perfunctorily. Taking into consideration the entire facts of the case and the parties, we find the submission wholly without merit.

CONCLUSION

[35] For the foregoing reasons, we concluded that the processes to ensure procedural fairness as required by art 135(2) had not been adhered to, that the decision of the disciplinary authority was incomplete, and tainted with injustice.

Appeal allowed.

Reported by Afiq Mohamad Noor